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IN THE

Supreme Court of the United States

HANNAH O'CALLAGAHAN and EDWARD CORCORAN, *Petitioners,*

vs.

TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Respondents.*

No. 194

Brief of J. W. Robinson and J. P. Houser, Solicitors for Marie Carrau, in Opposition to the Petition for a Writ of Certiorari, Filed Herein.

J. W. ROBINSON,
J. P. HOUSER,
Solicitors for Marie Carrau.

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STATEMENT.

(*a*) On September 26, 1900, John Sullivan died in Seattle, Washington, seized of real and personal property of the estimated value of $500,000. He was engaged to respondent, Marie Carrau, and was to have been married to her on October 1, 1900. The night of his death he made a nuncupative will, devising all his property to Marie Carrau. The next morning after his death, Marie Carrau told Father Sweere, her spiritual adviser, of the oral will, and requested him to inquire of some lawyer whether or not an oral will was valid, which he did and in a few days informed her that an oral will was not good

in the State of Washington. That the deceased left no immediate relatives. Shortly after his death a special administrator was appointed in the Probate Department of the Superior Court of King County, and on November 19, 1900, respondent O'Brien was appointed administrator and has been in possession of the assets of said estate ever since, and said estate has been ever since, and is now being, administered in the Probate Department of said State Court. Believing that the oral will was void, Marie Carrau joined in asking for the appointment of an administrator; some time thereafter she accidentally learned from an attorney that an oral will was valid in Washington, and she immediately thereafter towit, on March 8, 1901, upon petition, caused this nuncupative will to be probated, and which was probated by the usual decree in the Probate Court and the former administrator continued as the administrator of the estate.

(*b*) Under the statutes of the State of Washington, any "person interested" may within one year contest a will so probated, and a large number of persons claiming to be the "only heirs" of the deceased, gave notice of such claim and appeared in the State Court "*In re* Estate of John Sullivan, deceased," a number of whom filed "petitions in contest" in the probate department of said court in said estate, contesting the validity of said will and with such claimants so appearing and filing contests, were these petitioners.

(*c*) Among such claimants was Eugene T. Sullivan, who was at that date, and for many years prior thereto had been, a citizen and resident of the State of Washington, as was also Marie Carrau and Terence O'Brien, and these contests of said will are still pending, undetermined in the State Court "*In re Estate of John Sullivan, deceased.*"

(*d*) On June 20, 1901, these petitioners, as British subjects, filed a bill in equity against Marie Carrau, as legatee under said will and Terence O'Brien as administrator of said estate, in the United States Circuit Court of the District of Washington. The purpose of the bill was to contest the will so probated and revoke the probate thereof, and in addition to the allegation of adverse citizenship, the bill alleged that the will was secured and probated by fraud, and that the probate court had not issued proper citation, and hence had no jurisdiction to probate the will. The administrator appeared and disclaimed any interest in the estate other than as an administrator appointed by the State Court. Marie Carrau appeared by her solicitors and at every stage of the proceeding objected to the jurisdiction of the Federal Court principally upon two grounds:

1st. Because the Circuit Court had no jurisdiction of the "subject matter," and,

2nd. Because it appeared upon the face of the pleadings that if all the "*necessary*" parties were before the court, such court would be ousted of its jurisdiction, it appearing upon the face of the pleadings that Eugene T. Sullivan, claiming to be the only heir of the deceased, was a citizen and resident of the State of Washington, and claiming in opposition to Marie Carrau, as the legatee.

(*e*) The Circuit Court held that it had jurisdiction, and after trial entered a decree against Marie Carrau, cancelling the will and revoking the decree in the State Court, probating the same.

From this decree, Marie Carrau appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and the court reversed the Circuit Court, for the reason that the Circuit Court was without jurisdiction of the subject matter of

the suit, and further because of the fact that all the necessary parties were not before the court, who if made parties would have ousted the court of jurisdiction, and directed the Circuit Court to dismiss the bill.

See *Carrau v. O'Callagahan et al.*, 125 Fed. 657.

(*f*) And because of this reversal the petitioners apply here for a writ of certiorari.

POINTS AND AUTHORITIES.

1. The petition for a writ contains many erroneous statements as to the facts relating to the merits of the action, but we deem it unnecessary to burden this brief with any disputes as to such facts, for the reason that the court in certiorari proceedings does not consider the evidence but examines the allegations of fact as they appear upon the face of the pleadings and not otherwise, and hence this court will look at the face of the record and determine therefrom whether or not this writ should issue.

NO JURISDICTION OF THE "SUBJECT MATTER."

Upon the face of the pleadings it appears that at the time the suit in equity was instituted in the Circuit Court, and long prior thereto, the estate of John Sullivan, deceased, was being administrated in the Probate Department of the State Court, at Seattle, having jurisdiction of probate matters, and we here refer to the decision of the United States Circuit Court of Appeals, in the case of,

Carran v. O'Callaghan et al., 125 Fed. 657,

which contains a statement of the facts alleged in the pleadings and sets forth fully the probate statute laws of the State of Washington, showing that the contest of a will is strictly a probate proceeding, and that the State Court of Washington, having probate jurisdiction, has the sole and exclusive jurisdiction thereof, and as was said by the Circuit Court of Appeals, in 125 Fed., *supra*:

"A petition to probate a will is the beginning of a special proceeding and that the order admitting the will to probate is not final so long as the proceedings may be taken (under the

statute) to revoke the probate. In all subsequent stages the contest is but a part of the proceeding to probate the will and is not a new or distinct proceeding. The subject matter is the same and the ultimate issue, to wit, whether the will in question should stand as probated, is the same."

We also call the court's attention to the fact that the Supreme Court of the State of Washington, in construing the statute with reference to probate proceedings, has always held that the proper court under the statutes of the State in which to contest the validity of a will, is that Department of the Superior Court exercising probate jurisdiction.

Under the laws of the State of Washington, that Department of the Superior Court having probate jurisdiction as a court of law, is vested with the sole jurisdiction over every question involved in this case. In the exercise of this power as a court of law, it must determine all questions relating to the distribution of estates, pass upon the validity of wills, the question of heirship, fraud and all other questions affecting the validity of wills, and that forum affords a complete, efficient, prompt and adequate remedy at law for these petitioners, and is exclusive.

Section 6110 and section 6347 to 6377, Bal. Code Wash. Vol. 2, contemplate the trial and determination in the Probate Department of all questions of heirship as well as the right to take under wills, and the contest of a will necessarily includes the determination of the questions of kinship as an issue incident to the right to contest.

The Supreme Court of the State of Washington, from its organization, has held that the Superior Court acting in probate has the power in the administration of estates, to determine every question and grant all the relief presented and

sought by these complaints, and that the Probate Department has the sole and exclusive jurisdiction to do so.

Webster v. Seattle Trust Co., 7 Wash. 651.
Griffin v. Warburton, 23 Wash. 231.
State, ex rel. Stratton, v. Tallman, 25 Wash. 295.
State, ex rel. Stratton, v. Tallman, 29 Wash. 317.
In re Alfred's Estate, 27 Wash. 175.
Browder v. Finney, 30 Wash. 74.
Filley v. Murphey, 30 Wash. 1.
In re Murphey's Estate, 30 Wash. 9.
Reformed Presbyterian Church v. McMillan, 31 Wash. 643.

Under the general practice in the State of Washington, neither the courts of law nor equity have ever assumed to exercise jurisdiction over probate matters, and where the State Court has never assumed such jurisdiction or adopted such practice, the Federal Courts will not.

Bedford Quarries Co. v. Thomlinson, 95 Fed. 208.
Walker v. Brown, 63 Fed. 204.
Wahl v. Brown, 63 Fed. 680.
In re Cilley, 58 Fed. 977-982-984 and 989.
Ellis v. Davis, 109 U. S. 485.
Simmons v. Saul, 138 U. S. 439.
Broderick's Will, 21 Wall. 503.
Reed v. Reed, 31 Fed. 53.
In re Aspinwall's Estate, 83 Fed. 952.
Oakley v. Oakley, 64 Fed. 246.
Blythe v. Hinckley, 84 Fed. 250.

The case of *Bedford Quarries Co. v. Thomlinson*, above cited, was an action, brought in the United States Circuit Court to charge the executors of an estate with a claim held by complainant, and the Circuit Court of Appeals held that inasmuch as the Probate Court gave an adequate remedy at law, the Circuit Court had no jurisdiction.

The case of *Wahl v. Franz*, supra, was an action to revoke the probate of a will and cancel the will itself on the ground of fraud, etc., presenting certain features resembling some of the questions at issue in the case at bar. It was held by the Circuit Court of Appeals that the Probate Court having jurisdiction, no jurisdiction existed in the Federal Court, and further that such an action was neither a "suit of civil nature at law or in equity" within the meaning of the federal judiciary act.

This case is a well considered one and becomes valuable in view of the fact, that the question of the apparent conflict of authority is fully and carefully discussed and the authorities pro and con cited and considered both in the prevailing opinion and the dissenting opinion of Judge Sanborn.

NECESSARY PARTIES OUSTS JURISDICTION.

We think the law as declared by the United States Circuit Court of Appeals, 125 Fed. supra, to the effect that all the necessary parties were not before the Circuit Court, and if made parties would have ousted the court of its jurisdiction, cannot be seriously disputed. The face of the record discloses the fact that a large number of persons claiming to be the "only heirs" of the deceased were and are contesting with Marie Carrau in the State Court, the validity of the will, and their right to inherit this estate, and that Eugene T. Sullivan is among this number, and that he is a citizen and resident of the State of Washington and it must be conceded that if these claimants who are citizens had been made party complainants with these petitioners in the Federal Court, the court would have been ousted of its jurisdiction.

A court of equity will not assume jurisdiction to determine the rights of individuals, unless by so doing, it is enabled to

make a complete and final decree, not only as to the subject matter involved, but as to the persons interested, and whenever it is made to appear that necessary parties are not before the court, they must be brought in, and if bringing them in, the court would be ousted of its jurisdiction, the action will be dismissed.

Mallow v. Hinde, 12 Wheat. 197.
Cameron v. McRoberts, 3 Wheat. 591.
Hardy v. Handy, 11 Wheat. 132.
Elmdorf v. Taylor, 23 U. S. 167.

The Supreme Court of the United States in the more recent case of the *State of California v. Southern Pacific Co.*, 157 U. S. 229, reviews the cases cited above, reaffirming the doctrine therein laid down, and in doing so uses the following language:

"Can the Court proceed to a decree, as between the State and the Southern Pacific Company and do complete and final justice without affecting other persons not before the Court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

It appeared that a decree in that case could not directly affect the city of Oakland, but by making it a party the Court would be ousted of its jurisdiction, yet the Court proceeds to say:

"We have no hesitation in holding that, when an original cause is pending in this court, to be disposed of here in the first instance, and in the exercise of an exceptional jurisdiction it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined even though they might not be technically bound in subsequent litigation in some other tribunal."

In *Gregory v. Stetson*, 133 U. S. 579,

Justice Lamar, after quoting from Story's Eq. Pl., lays down

the rule that all parties must be brought before the court and says:

"By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done either to the parties before it or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits."

"The general question involved therein has been before this court a number of times and it is now well settled that, notwithstanding the statute referred to and the 47th Equity Rule a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby."

In the recent case of *Minnesota v. Northern Securities Co.*, known as the "Merger Cases," 22 Sup. Ct. Rep., at page 322, the court says:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits and to make it perfectly certain that no injustice is done either to the parties before it or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view of the merits. This is founded upon clear reasons and may be enforced by the Court *sua sponte*, though not raised by the pleadings or suggested by counsel."

The inability of the Court to proceed appearing at any time before final judgment will warrant a dismissal and the Court should on its own motion if necessary dismiss the cause.

"Nor does it matter that the parties to this suit make no objection on account of a want of parties. Where that fact appears as in this case, the Court will on its own motion refuse to proceed further in the case."

Beasley v. Shirely, supra.

It must therefore appear that the case at bar falls directly within the rule above laid down for the reasons already stated.

The United States Circuit Court in its opinion in the case of

Carrau v. O'Callaghan et al, supra,

said:

"We are of the opinion that the court below was without jurisdiction of the subject matter of the suit and further that all necessary parties were not before the court, some of whom if made parties would have ousted the court of jurisdiction. On both of these grounds we think the court below should have dismissed the bill at the complainants' cost."

And on page 671, in speaking of the case of

Byers v. McAuley, 149 U. S. 608,

which is relied upon by the petitioners, the court said:

"There is in the case no suggestion of the absence of any necessary or proper party and no question of that nature was presented or considered. In the case at bar, however, there were persons not made parties to the suit who claimed to be the sole and exclusive heirs of the deceased and who if made parties, would on the grounds of citizenship, oust the Federal Court of any jurisdiction in the premises. * * * Those claimants were, therefore, essential parties to the controversy concerning the heirship in question and we think counsel for the appellees altogether mistaken in saying that there is anything to the contrary in

Byers v. McAuley,

or in the case of

Payne v. Hook, 7 Wall. 425."

It is conceded that the Superior Court acting in probate, must distribute the assets of the estate and we insist that in doing so it must determine who are the heirs or legatees and to whom the estate shall be distributed. The State Court of Washington has so far held the will valid and the statute authorizing such wills constitutional, and the Federal Courts usually follow the rule of construction adopted by the State Courts.

If the jurisdiction of the Federal Court can be maintained in this suit, then more than 50 per cent of the contests of wills, and all questions relating to estates, may be brought into the Federal jurisdiction, and the jurisdiction of the United States Circuit Court under the act of 1887 as corrected by the act of 1888 enlarged rather than reduced the jurisdiction under such a construction. It is the policy of the Federal Courts to concede jurisdiction to the State Courts where the statute confers special jurisdiction on the State Court, and no independent suit can be brought in any other department for the adjudication of questions within such special jurisdiction, and it is only where such special jurisdiction is ineffective to deal with the question at issue, that a court of equity can ever assume jurisdiction.

Bailey v. Bailey, 48 Am. St. 826.
Peterson v. Vandeburt, 77 Am. St. 671.
Deck v. Durkey, 73 Am. St. 559.

Solicitors for petitioners here insist, as they have always insisted, that the contest of a will in the State of Washington, is a suit *inter partes*, but the United States Circuit Court of Appeals as well as the Supreme Court of the State of Washington, has held that a petition to probate a will is the beginning of a special proceeding and that all subsequent stages of a contest is but a part of the proceeding to probate the will, and is not a new proceeding, and this doctrine has been fully recognized in this State.

Actions *inter partes* in the Superior Court of the State of Washington are commenced *by service of a summons.*

Ballinger's Code, Section 4869.

The Superior Court having jurisdiction of the subject matter either in law or equity, secures jurisdiction of the person *by summons, but in all probate proceedings citations instead of*

summons is used, and this distinction is ever present, both in the statute and the Constitution. The process in all suits *inter partes*, is a summons, and in all proceedings in probate, is a citation.

The solicitors for the petitioners contend that any action having for its object or effect the contest of the validity of a will, as provided in,

Sec. 6110 Ballinger's Code,

is a suit in equity, but if this procedure is to be applied to

Sec. 6110 of Ballinger,

with reference to the validity of a will, then it must also apply to that portion of the section which provides for the proving or probating of a will, which has been rejected, so that the procedure to have the will proven, which has been rejected, by the Probate Court, must also be instituted in a court of equity, and not in the Probate Court; but it will scarcely be argued that the Superior Court as a court of equity, has jurisdiction to probate a will, when that power has been lodged exclusively with the Court sitting in Probate, yet that is the effect of appellees' contention.

Suppose the Probate Court, on March 8, 1904, had rejected the nuncupative will, and suppose that there were no other heirs of the deceased, except these petitioners, subjects of the Kingdom of Great Britian, would it be claimed that the respondent, Marie Caran, could have filed her petition in the Federal Court, alleging the proper diversity of citizenship and value sufficient in amount to come within the jurisdiction of the Circuit Court of the United States, and maintained her action to have the will proven which had been rejected? Or, in the event she had filed such petition in the Superior Court

against these petitioners to have such will proven, could they have removed the action to the Circuit Court of the United States? The diversity of citizenship and the value of the subject matter, would not have been changed by the rejection of the nuncupative will, and they were not changed by the decree probating the will.

Again, had the nuncupative will been rejected and a decree entered by the Probate Court, finding all the jurisdictional facts necessary to give the Probate Court jurisdiction to hear the petition for probate, could Marie Carran have maintained a bill in equity in the United States Circuit Court, against these petitioners, charging them with fraud, in securing the rejection of the probate of said will, and that such will be proven and a decree of probate entered accordingly?

If she could not maintain such a suit, then these petitioners could not maintain their suit, because the one proposition is the converse of the other.

JURISDICTION TO PROBATE THE WILL.

It is claimed that this nuncupative will was probated without jurisdiction because no notice was given to the heirs or next of kin, but the face of the record discloses the fact that the State Court in probating the will found all the jurisdictional facts necessary to give the court jurisdiction to probate the will; but even admitting that the notice or citation was irregular or insufficient, it is admitted by these petitioners that there was at that time, no known heirs or next of kin described in the statute to whom notice should be given and the statute with reference to such notice does not contemplate service at large upon every one who may claim to have an interest in the estate; certainly the statute does not contemplate that notice shall be served upon

persons residing in Great Britian who may claim an interest in the estate.

Again, the statute preserves the rights of all "persons interested" for a period of one year within which they may test every question in the probate Department where the estate is being administered, and it will hardly be claimed that this notice was necessary to give the court jurisdiction of the subject matter. The court already had jurisdiction of the subject matter and for many months had been administering this estate.

But even if notice was required, these petitioners, as appears from the face of the record, waived their right to any notice if ever entitled to any, by appearing in said probate proceedings and filing a contest within the year, seeking exactly the same relief they sought in the Circuit Court.

We are not inclined to dicuss the constitutionality of the statute with reference to nuncupative wills, because as we understand, that question will not be considered upon the petition for this writ, but we suggest to this Honorable Court that this statute has been held constitutional by he State Court in probating the will and in administering the estate with reference thereto.

But if there was any defect in the title of this law, which was enacted in 1854 and amended in 1873, it was wholly cured when the laws of the Territory were codified and incorporated in the Code of 1881. The Legislature enacted a provision in the Code of 1881 in lieu of the act of 1854, as amended in 1873 and thus these provisions were made the law upon the question of nuncupative will, and the Supreme Court of the State of Washington has fully confirmed our position in this particular, in the case of

Philbrick v. Andrews, 8 Wash. 7.

The Circuit Court in the suit of these petitioners against O'Brien and Carran, was urged to review the act of the State Court in admitting the will in question to probate; to vacate the same and the court did so, but the Circuit Court of Appeals held that the Circuit Court had no such jurisdiction, and in addition thereto, the Circuit Court was asked to declare the State law upon which the will rests, unconstitutional in advance of the State Court, notwithstanding the fact that the same question was then pending before the State Court, and the pleading in that court setting up the will in question had already been held good on demurrer. Under such circumstances the Federal Courts will refuse to pass upon the constitutionality of the laws or if it does so will adopt the conclusion of the State Court.

Pelton v. National Bank, 101 U. S. 143; 25 Law Ed. 901.

Cummings v. National Bank, 101 U. S. 155; 25 Law Ed. 904.

Hills v. Exchange Bank, 105 U. S. 319; 26 Law Ed. 1052.

Western Union Telegraph Co. v. Poe, 61 Fed. 469.

Same case, 64 Fed. 11.

The case of the *Western Union Telegraph Co. v. Poe, supra*, presents our contention fully, and reviews the authorities. In that case the Circuit Court held the question of the constitutionality of the act in question for four months waiting for the State Court to pass upon it, and finally, at the urgent request of complainants, did pass upon it and held the act unconstitutional. Afterwards the State Court passed upon the act and held it constitutional and the Circuit Court reversed its former ruling and held in harmony with the decision of the State Court.

We respectfully submit that the writ ought not to issue, because it appears upon the face of the record that the Circuit

Court had no jurisdiction of the subject matter, and that if such court had jurisdiction, it would be ousted of its jurisdiction, were all the necessary parties before the court, and also because the decision of the Circuit Court of Appeals was a final decision under the act of March 3, 1891, and having clearly and rightfully declared the law with reference to the question of jurisdiction, these petitioners ought not to be permitted to further delay and interfere with the due administration of this estate in the Probate Court in the State, in which Court their rights may be fully protected.

Respectfully submitted,

J. W. ROBINSON,
J. P. HOUSER,
Solicitors for Marie Carrau.